

SERVICE DATE – SEPTEMBER 25, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35081 (Sub-No. 2)

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.—CONTROL—DAKOTA,
MINNESOTA & EASTERN RAILROAD CORP., ET AL.

Digest:¹ The State of South Dakota, by and through its Department of Transportation, has asked that the Board enforce certain representations that Canadian Pacific Railway Company (CP) allegedly made as part of an acquisition the Board approved in 2008. Because the record establishes that CP has largely adhered to its investment representation, and the argument regarding the track upgrade representation is moot as the result of a subsequent disclosure from the Federal Railroad Administration, the Board will deny the petition.

Decided: September 23, 2015

BACKGROUND

In 2007, Canadian Pacific Railway Company (CP), Soo Line Holding Company (Soo Holding), Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and DM&E's wholly owned rail subsidiary, Iowa, Chicago & Eastern Railroad Corporation (IC&E), sought approval under 49 U.S.C. §§ 11321-26 for CP's acquisition of indirect control of DM&E and IC&E (collectively, DME)² through ownership of DME stock by Soo Holding.³ As part of its application, CP submitted a Safety Integration Plan (SIP), prepared by CP and DME under 49 C.F.R. § 1106, with input from the Federal Railroad Administration (FRA), which addressed how the acquisition transaction would be implemented safely and enhance DME's safety practices and performance in numerous areas.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The parties use "DME" when referring collectively to DM&E and IC&E, and we have adopted the same practice in this decision.

³ Hereinafter, unless otherwise noted, references to CP include affiliated corporate entities, including DM&E and IC&E.

The Board approved the acquisition, subject to conditions, in Canadian Pacific Railway—Control—Dakota, Minnesota & Eastern Railroad, FD 35081 (STB served Sept. 30, 2008) (Approval Decision). As part of its approval of the acquisition, the Board ordered CP to “adhere to any and all of the representations [it] made on the record during the course of this proceeding.”⁴ The Board also ordered CP to comply with the SIP and to continue to coordinate with FRA in implementing the SIP until FRA informed the Board that the transaction had been safely implemented.⁵

On August 8, 2013, the State of South Dakota, acting by and through its Department of Transportation (State), filed a petition requesting that the Board enforce three representations allegedly made by CP concerning capital investments. First, the State claims that CP represented that it would invest \$300 million (including previously budgeted DME monies) in the first three post-acquisition years (i.e., 2009 through 2011) in DME and allocate a certain percentage to each of these railroads (40% to IC&E and 60% to DM&E). Second, the State claims that CP, upon receiving concerns about this first representation, made a second representation that the \$300 million figure would not include \$172.9 million previously budgeted by DME, meaning that a total of \$472.9 million in funds would be invested in DME in the first few years following the acquisition. Finally, the State claims that CP represented that it would invest \$300 million to upgrade all DME track to FRA Class 3 standards.⁶

The State asked the Board, among other things, to direct CP “to produce the investment information necessary to determine CP’s actual capital investments in DME since 2008,” asserting that such information was necessary to determine whether CP has adhered to the first two representations. The State also asked the Board to direct CP to submit a verified statement addressing CP’s view on its compliance obligations, given the State’s view that “CP has acknowledged that it did not expend \$300 million to upgrade all DME track to Class 3 standards.”⁷ The State further requested that the Board provide the State and other interested parties an opportunity to file comments responding to CP’s submissions, and then issue an appropriate enforcement order against CP.

CP filed a reply in opposition on August 28, 2013,⁸ in which it asserted that it has fully complied with the representations made in the acquisition proceeding and that there is no basis for an enforcement order against CP. The State filed its first supplement to its August petition on

⁴ Approval Decision, slip op. at 27.

⁵ Id.

⁶ The third representation was described in a July 14, 2008 letter filed with the Board by FRA and embraced by the Board in its 2008 decision approving CP’s acquisition of DME.

⁷ State Pet. 28.

⁸ CP filed a public version of its reply and, pursuant to a protective order the Board issued on September 21, 2007, a highly confidential version under seal. The parties also submitted a number of other documents under seal. We reference information in these filings only to the extent necessary to render a thorough and well-reasoned decision.

September 20, 2013, and CP filed a reply to the first supplement on October 18, 2013. The Board also received statements and letters supporting the State's filing from a number of government agencies and representatives, individuals, and entities.

The U.S. Department of Transportation (DOT) and FRA jointly submitted a letter on September 30, 2013, correcting FRA's July 14, 2008 letter to the Board. They stated that, upon review of the record, CP had not represented to FRA that it would invest approximately \$300 million over four years to upgrade all DME track to Class 3 standards, as FRA had erroneously indicated in the July 2008 letter.⁹

Given the letter from DOT and FRA and the ambiguity regarding CP's investment commitment, the Board served a decision on December 20, 2013, granting the State's discovery request. The Board established a procedural schedule providing for a second supplement from the State and a reply from CP upon completion of discovery.¹⁰ In subsequent decisions, the last of which was served on August 22, 2014, the Board granted motions to extend the due date for the State's second supplement and the response from CP.¹¹

In its August 29, 2014 supplement, the State alleges that CP: (1) did not adhere to its representation that it would invest \$300 million in engineering capital dollars in the first three post-acquisition years or divide investments between DM&E and IC&E; (2) did not adhere to its representation that it would invest \$300 million in additional engineering capital dollars (over and above monies previously budgeted by DME) over the next several years following CP's acquisition of DME; and (3) failed to correct the Board's pre-approval belief, based on FRA's 2008 letter filing, that CP had committed to upgrade all DME track to Class 3 standards. The State claims that CP had known for years that the filing was false.

⁹ FRA and DOT also stated that FRA's prior letter related to the track upgrades contemplated by CP amounted to an "overgeneralization." DOT/FRA Letter 2 (filed Sept. 30, 2013).

¹⁰ In a decision served on March 26, 2014, the Board granted the State's February 14, 2014 motion to compel CP to answer interrogatories and produce many documents sought by the State.

¹¹ During these procedural steps, the Board authorized, through the exemption process, the acquisition by the Rapid City, Pierre & Eastern Railroad (RCP&E), a non-carrier, of approximately 670 miles of rail lines of DM&E in South Dakota, Wyoming, Minnesota, and Nebraska. See Rapid City, Pierre & E. R.R.—Acquis & Operation Exemption Including Interchange Commitment—Dakota, Minn. & E. R.R., FD 35799 (STB Mar. 27, 2014). In Docket No. FD 35800, also through the exemption process, the Board permitted Genesee & Wyoming Inc., RCP&E's corporate parent, to continue in control of its subsidiary after RCP&E received a license as a rail carrier. See Genesee & Wyo.—Continuance in Control Exemption—Rapid City, Pierre & E. R.R., FD 35800 (STB served Mar. 27, 2014). The State did not oppose the line sale to RCP&E.

The State requests that the Board find that CP has not adhered to its investment representations and that CP has breached an obligation of candor to the agency. The State requests that the Board order CP to pay the State \$22 million, which the State asserts represents its pro-rata share of the engineering capital investments CP promised. The State also asks that the Board award it its reasonably incurred attorneys' fees and expert witness costs.

On October 2, 2014, CP filed its reply to the State's second supplement. CP claims that it only committed to "make available to DME \$300 million over the next several years to repair and upgrade its track, bridges, and other facilities."¹² CP claims that it has fulfilled this commitment and, in fact, invested far more than this sum as owner of DME. Although CP acknowledges that it may not have invested the entire \$300 million within the first three post-acquisition years, it states that it did so not long after and that any delay in doing so was because the economic downturn made the need for capital expenditures less urgent. CP further argues that it did not make the alleged second representation and that the State is not entitled to \$22 million. As to the State's third cause of action, CP claims to have gained no advantage from FRA's "inadvertent statement" and argues that the State has not shown that any party relied on the error to its detriment. CP therefore opposes the relief sought by the State and asks that the Board deny the State's petition for enforcement.

DISCUSSION AND CONCLUSIONS

As part of its approval of the acquisition, the Board ordered CP to "adhere to any and all of the representations [it] made on the record during the course of this proceeding."¹³ The record establishes that CP has adhered largely to the representation that it made concerning its planned investment and that the State's claim regarding the representation pertaining to upgrading the track is now moot. Thus, the Board denies the State's petition for enforcement and, accordingly, cannot rule on its related request for remedial relief.

First Claim: Investment of \$300 Million. According to the State, CP represented that it would invest \$300 million (including investment dollars previously budgeted by DME) in DME road facilities, in the first three years following the acquisition of DME. The State identifies various statements in CP's application where CP allegedly made statements to this effect.¹⁴ The State argues that the \$300 million amount comprises the sum of DME's pre-acquisition capital budget for years 2009 to 2011 and additional monies CP committed to provide DME. The State asserts that CP's records show expenditures of \$226.8 million in the first three post-acquisition years.¹⁵ The State also alleges that CP did not adhere to its plan to allocate a certain percentage of its investments on DM&E lines, particularly lines in South Dakota.¹⁶

¹² CP Reply to Second Supp. 12-13.

¹³ Approval Decision, slip op. at 27.

¹⁴ See, e.g., CP Appl., Ex. 13 at 30, 36, & 40, V.S. Graham 4 (filed Oct. 5, 2007).

¹⁵ State Supp. 3. The State asserts that the \$226.8 million figure includes a credit of \$13.5 million CP advanced to DME in 2008.

¹⁶ State Second Supp., V.S. Ludwig & Ellison 5-6.

CP asserts that it has fulfilled its commitment by investing far more than \$300 million to repair and upgrade DME's rail facilities.¹⁷ CP states that the economic conditions in 2009 required it to amend its plan for capital expenditures on DME so that it took four years, rather than three, to spend the promised amount.¹⁸

We find that while CP indeed represented that it would make \$300 million in capital investments in DME road property, CP has largely adhered to its representation. In its application, CP stated that it would "make available to DME \$300 million over the next several years to repair and upgrade its track, bridges and other facilities," which would "address conditions that have contributed to safety concerns in recent years, and will improve the fluidity of train operations."¹⁹ CP also indicated that "[a]pproximately \$100 million would be dedicated to this effort in each of the three years following approval of the transaction."²⁰ The record shows that by 2012, CP had made more than \$310 million in DME capital investments. Although it took CP four years to meet the \$300 million commitment instead of three, CP reasonably explains that the additional year was because it deferred a portion of its capital spending in 2009 due to the economic downturn that resulted in a substantial reduction in rail traffic that year.

With regard to the State's claim that CP would allocate a certain percentage of investment on DM&E's system, the record indicates that no such commitment was made by CP. Rather, CP noted that decisions on where and how capital investments were made would be based upon detailed field inspections conducted after consummation of the acquisition.²¹ Further, CP states that, although no commitment was made by CP or requested by the State for CP to invest a particular amount of CP's capital budget in South Dakota, significant investments were made in the State prior to the lines being sold to RCP&E in 2014, with approximately 57 miles of track in South Dakota upgraded to Class 3 standards. CP states that virtually all 206 miles of DM&E main line track between Pierre, S.D., and the Minnesota border were at Class 3 standards when sold to RCP&E.²²

The record demonstrates that CP has largely adhered to its representation to make a \$300 million investment in DME. CP has presented a reasonable explanation for the timing of its capital investments as a result of the economic downturn.

Second Claim: Investment of \$472.9 Million. The State asserts that, after CP made its first representation, the Mayo Clinic filed a comment noting that the pledge of \$300 million was misleading because it included \$172.9 million that DME had already budgeted for its soon to be

¹⁷ CP Reply 17.

¹⁸ CP Reply to Second Supp. 12-16.

¹⁹ CP Appl. 5.

²⁰ CP Appl., V.S. Graham 4.

²¹ See CP Appl., Ex. 13 at 36, CP Reply to Second Supp. 33.

acquired system. In turn, the State asserts, CP made a second representation in a later filing whereby it would invest \$300 million *beyond* the original \$172.9 million. Therefore, according to the State, CP represented it would make a total capital investment in DME of \$472.9 million. This allegation is based on an excerpt from CP in the acquisition proceeding:

With respect to Mayo's concern about DME track conditions, [CP] has committed to invest at least \$300 million in additional capital (over and above DME's projected capital budget) over the next several years to upgrade DME's track and structures. *See* Graham Reply V.S. at 6-10; Application Operating Plan at 36-37; SIP at 89-90. This capital investment will be used to make significant improvements to DME infrastructure, which in turn will improve the efficiency of DME operations and the safety of the DME system, all in a relatively short period of time. One effect of this additional investment will be to increase total capital spending on improvements to the DME system (previously planned DME capital spending plus additional CPR capital spending) to approximately \$100 million annually in each of the first three years following approval of the transaction. Graham Reply V.S. at 10.²³

The State argues that, between January 1, 2009, and July 1, 2013, CP expended only \$170.4 million (not including previously budgeted DME monies), thus falling \$129.6 million short of its commitment to spend \$300 million in additional capital dollars.²⁴

In reply, CP asserts that it did not make a second representation to invest a total of \$472.9 million, as alleged by the State.²⁵ Rather, CP argues that it has stated consistently throughout the proceeding that it had promised to invest a total of \$300 million to improve DME's track and facilities.²⁶ CP notes that the last sentence of the paragraph quoted by the State states unequivocally that CP planned to increase "total" capital spending "to approximately \$100 million annually in each of the first three years following approval of the transaction," thus contradicting the State's assertion that CP promised more than \$300 million capital investment.²⁷

We find that the record does not support the State's view that CP would invest an "additional" \$300 million in addition to the \$172.9 million DME had previously budgeted for capital investments. The above-cited excerpt, upon which the State bases its claim, presents two apparently contradictory descriptions of CP's planned capital investments. In the first quoted sentence, CP describes its commitment as "\$300 million in additional capital (over and above

²³ See State Pet. 11-12, 23-24 (citing CP Reply to Comments & Requests for Conditions & Rebuttal, Vol. 1 at 75 (filed April 18, 2008)).

²⁴ State Second Supp. 16-17.

²⁵ CP Reply 17-20.

²⁶ Id.

²⁷ Id.

DME's projected capital budget)." But in the last sentence of the excerpt, CP indicates its intent to make capital investments *totaling* \$300 million: "one effect of [CP's] additional investment" would be to bring "*total* capital spending . . . (previously planned DME capital spending plus additional CPR capital spending) to approximately \$100 million annually in each of the first three years following approval of the transaction" (emphasis added).²⁸

Additional evidence lends support to the second of these two characterizations as the one CP intended. For example, CP stated that it "projects that it will make available to DME approximately \$300 million in capital for improvements to DME's track, bridges and other rail facilities in the first three years following approval of the transaction."²⁹ Similarly, CP stated that it "projects that it will make available approximately \$300 million in capital for improvements to DME's track and ties, bridges and other rail facilities and systems and processes."³⁰ And CP also represented that "the effect of this additional investment will be to increase total capital spending on improvements to the DME system (previously planned DME capital spending plus additional [CP] capital spending) to approximately \$100 million annually in each of the first three years following approval of the transaction."³¹ Thus, the record demonstrates that CP has made the investments it intended to make.

Third Claim: Upgrade of Track to FRA Class 3 Standards. Citing FRA's 2008 letter to the Board, the State argued that CP, as part of the SIP process, had committed to upgrading all DME track to FRA Class 3 standards. CP contends that it did not make this representation and that the State's argument is predicated solely on a misstatement by FRA in a letter to the Board.³² DOT and FRA have since explained that, upon review of the record, CP did not make this representation to FRA and that the statement made in FRA's 2008 letter was a misleading

²⁸ The State argues that these two sentences can be read in harmony. See State Second Supp. 19. However, the record demonstrates that CP only intended the characterization in the second of these two sentences.

²⁹ CP Appl., Ex. 13 at 36.

³⁰ CP SIP 89 (filed Feb. 4, 2008). It appears that CP made a commitment to expend \$300 million in total as part of the SIP process. FRA, the entity responsible for monitoring the implementation of the SIP, has not interpreted CP's representation as a pledge to spend more. Rather, as CP notes, the letters from DOT and FRA to the Board convey FRA's understanding that CP had made a commitment to expend approximately \$300 million to repair and upgrade DME track, bridges, and facilities. FRA has not indicated that it had any concerns, during its monitoring of CP's implementation of the SIP, regarding a failure by CP to adhere to any representations about capital investment expenditures. See FRA Letter, FD 35081 (filed July 14, 2008); DOT/FRA Letter (filed Sept. 30, 2013).

³¹ CP Reply to Comments & Requests for Conditions & Rebuttal, Vol. 1, V.S. Graham 8.

³² CP Reply 22-23, V.S. Wilson 10; CP Reply to Second Supp. 25.

generalization.³³ Given the correction in DOT/FRA's September 2013 letter, the issue of whether CP made a representation to upgrade all DME track to Class 3 standards is moot.³⁴

Finally, the State faults CP for making no effort to correct the representations made in FRA's 2008 letter and requests that the Board commence an enforcement action or award attorneys' fees as a result of CP's inaction. The Board expects a party to clarify or correct any misrepresentations it has made, or misunderstandings it may have caused, in proceedings such as these. The Board also strongly advises parties to apprise the Board of third-party errors, should they occur. Here, however, we cannot take enforcement action or award the State attorneys' fees based on this record.

Conclusion. The record shows that CP has presented a reasonable explanation for the timing of its capital investments and that it has largely adhered to its representation made in the course of the acquisition proceeding that it would make available to DME \$300 million of capital to repair and upgrade DME track, bridges, and other rail facilities. The record does not support the claim that CP represented it would invest beyond this amount, despite the two contradictory descriptions of CP's planned capital investments. Finally, the representation that CP would upgrade all DME track to Class 3 standards is now moot. Accordingly, the Board denies the State's petition for enforcement.

It is ordered:

1. The State's petition is denied.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

³³ The State indicates in its second supplement that it is no longer pursuing enforcement of a CP representation that it would upgrade all DME track to Class 3 standards. State Second Supp. 27.

³⁴ The State suggests that the Board "denied all specific requests for all safety-related conditions" based on FRA's initial erroneous statement that CP would upgrade all DME track to Class 3 standards. State Pet. 15. However, the Approval Decision explains that the Board denied the safety-related requests proposed by the Minnesota Department of Transportation and the Wisconsin Department of Transportation on grounds that the requested conditions, which pertained to grade crossings and train speeds, are unnecessary given the existing federal regulations and programs in place to address those issues and the absence of any showing that the regulations and programs would be inadequate to address the concerns that had been raised. Approval Decision, slip op. at 21. In response to the Mayo Clinic's concerns about the safety and rehabilitation of lines in Rochester, Minn., the Board stated in the Approval Decision that it would hold CP to its representation that the line through Rochester would be upgraded to Class 3 standards. *Id.* at 23. CP notes that it has completed that upgrade, and that it is in the process of completing another section it agreed to upgrade as part of the acquisition proceeding. See CP Reply, V.S. Wilson 6-7.